



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: RGI, Inc.

File: B-243387.2; B-243387.3

Date: December 23, 1991

Edward J. Tolchin, Esq., Fettmann & Tolchin, for the protester.

Jaime Ramon, Esq., Office of Personnel Management, for the agency.

John W. Van Schaik, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Under the Bid Protest Regulations, General Accounting Office (GAO) will reverse a prior decision on reconsideration only where the requester shows that it contains errors of fact or law or that GAO failed to consider relevant information.

2. Protest that awardee engaged in "bait-and-switch" tactics is denied since although most of the personnel which the awardee originally proposed were not available to perform the contract, nothing in the record indicates that the awardee submitted personnel commitment forms in bad faith or without the consent of the individuals proposed and record provides plausible reason for the use of substitute personnel.

DECISION

RGI, Inc. requests reconsideration of our decision RGI, Inc., B-243387, July 23, 1991, 91-2 CPD ¶ 86, in which we denied its previous protest of the award of a contract to Advanced Management, Inc. under request for proposals (RFP) No. OPM-RFP-90-02002, issued by the Office of Personnel Management (OPM) for software support services for the agency's Personnel Investigations Processing System. RGI also protests the same award, this time based upon the argument that Advanced Management is performing the contract with individuals other than those which were proposed and evaluated.

We deny the reconsideration request and the protest.

BACKGROUND

The solicitation contemplated the award of a cost-plus-fixed-fee labor hour contract for software support, system maintenance, documentation, testing and technical support. The solicitation required that all contractor staff must be available at the "start work date," which is "approximately thirty (30) days prior to expiration of the current contract" and stated that staff providing support under the contract were to be "separate, completely independent, dedicated, full-time, on-site . . . based in Washington, D.C." and except for substitutes used on temporary, short-term assignments, "sharing of contractor staff with other contractor accounts is unacceptable."

In awarding the contract to Advanced Management, OPM noted that the firm had the highest technical score and its estimated cost was one of the lowest. The agency also stated that Advanced Management's technical/management proposal was rated 2.54 points higher than RGI's, the next highest. With respect to cost, the agency noted that Advanced Management's estimated cost was 5 percent lower than that of RGI, the next highest rated proposal.

In its initial protest, among other allegations, RGI argued that the technical evaluation was flawed because OPM did not evaluate whether the individual proposed by Advanced Management as its data base specialist would be available at the start work date, and completely dedicated, full-time and on-site, 30 days prior to the expiration of the incumbent contract, as required by the solicitation. RGI argued that, in fact, the individual proposed by Advanced Management could not be available when required because at that time he was RGI's data base specialist on the incumbent contract and, therefore, he would be working for RGI until that contract expired.

We disagreed with the protester, concluding that OPM acted reasonably in evaluating Advanced Management's proposal. We noted that Advanced Management's proposal included the required commitment from the individual proposed as its data base specialist and that RGI did not argue that the individual in question was unwilling to work for Advanced Management. Moreover, since this individual was already performing the same job under RGI's contract, the purpose of the phase-in period--to allow an orderly transition of the work from the old to the new contractor--would be served whether he is working for Advanced Management or RGI during the phase-in period. We also stated that although Advanced Management's data base specialist would not be available to the awardee during the phase-in period, as required by the solicitation, there would be no competitive harm in OPM's accepting Advanced Management's offer of this individual.

We stated that RGI's reading of the solicitation--which would require OPM to reject or downgrade any proposal that included personnel who are currently working on the incumbent contract--would be unreasonable.

We also rejected RGI's argument that the agency did not evaluate whether other personnel proposed by Advanced Management met the solicitation requirement that staff be "separate, completely independent, dedicated, full-time," and not be shared with other contractor accounts. In addition, contrary to RGI's contention, we concluded that OPM properly evaluated Advanced Management's proposal in accordance with the solicitation's evaluation criteria relating to benefits and compensation for professional employees.

RGI'S RECONSIDERATION REQUEST

In its reconsideration request, RGI argues that we erred in our initial decision by concluding that no competitive harm would result from OPM's failure to reject the data base specialist proposed by Advanced Management. According to RGI, if Advanced Management had been required to comply with the solicitation, which required that the data base specialist be available during the phase-in period, that firm would have had to propose a different individual. RGI argues that under these circumstances, Advanced Management's score would have been lower and it would not have received the award.

By competitive harm, we meant that no one vendor in the field of competition was placed at a competitive disadvantage by the agency's reading of the solicitation. In other words, all vendors were or should have been equally on notice that personnel employed by the incumbent contractor could be proposed for the same positions by other offerors. Obviously, RGI was not competitively harmed in that sense. While RGI speculates that the evaluation results would have been different had its competitors not been permitted to propose the use of RGI employees, RGI is not entitled to relief simply because it might have benefited from a more restrictive reading of the solicitation. See Hampton Roads Leasing, Inc.--Second Request for Recon., B-236564.4, Aug. 6, 1990, 90-2 CPD ¶ 103.

Under our Bid Protest Regulations we will reverse our prior decision upon reconsideration only where the requester shows that it contains either errors of fact or law or that we failed to consider information that was not available when the initial protest was filed. 4 C.F.R. § 21.12(a) (1991). RGI has not met this standard.

RGI's SECOND PROTEST

RGI argues that when OPM notified Advanced Management that it should prepare to perform the contract, that firm informed OPM that only one of the personnel proposed by the firm would be assigned to the contract. According to RGI, at that time Advanced Management submitted new resumes for all of the remaining personnel and OPM evaluated those resumes. RGI maintains that "it is plain from the fact that Advanced Management will offer only one of its initially proposed employees that the company misrepresented its intentions to offer these employees in the first instance." The protester argues since 50 percent of the evaluation credit under the solicitation was assigned to proposed personnel, Advanced Management effectively asked OPM to reevaluate 50 percent of its proposal. RGI maintains that this is a cardinal change in the contract awarded to Advanced Management and constitutes a new procurement for which RGI should have had an opportunity to compete.

OPM reports that pursuant to 31 U.S.C. § 3553(d)(1) (1988), it suspended performance of the contract on March 25, 1991, as a result of RGI's first protest. According to the agency, after we denied that protest, OPM, by letter of August 5, informed Advanced Management that the suspension was removed and that it should prepare to perform the contract. OPM admits that it is considering changes in Advanced Management's personnel pursuant to clause H.1 of that firm's contract which permits substitution of key personnel after review and approval by the agency. According to the agency, under this contract provision, it is within the agency's discretion to accept changes in personnel after contract award. The agency argues that it is unrealistic to expect that Advanced Management, a small company, would be able to keep the same personnel committed during the 4-month delay before the performance suspension was lifted. OPM also argues that any changes in Advanced Management's personnel 4 months after award do not constitute a cardinal change to the contract and as matters of contract administration are not within the scope of the bid protest function.

Offeror "bait-and-switch" practices, whereby an offeror proposes the use of personnel that it does not expect to actually use during contract performance, have an adverse effect on the integrity of the competitive procurement system and generally provide a basis for proposal rejection. Unisys Corp., B-242897, June 18, 1991, 91-1 CPD ¶ 577. This does not mean that in every case an offeror must use the personnel it proposed or risk losing the contract for which it is competing. For example, where the offeror provides firm letters of commitment and the names are submitted in good faith with the consent of the respective individuals

(that is, the offeror is not proposing personnel it has no intention of providing), the fact that the offeror, after award, provides substitute personnel does not make the award improper. Id.

In this case, we find no basis to conclude that Advanced Management proposed personnel it did not intend to use. The firm provided for each person it proposed the signed form required by the solicitation indicating that the person would be available to work if the contract were awarded to the firm and there is nothing in the record that indicates that Advanced Management submitted these forms in bad faith or without the consent of the individuals proposed.


Although Advanced Management now seeks to utilize personnel other than it proposed, the circumstances of this case do not suggest that Advanced Management intentionally misrepresented the availability of the personnel it proposed to use. Rather, as the agency argues, these circumstances suggest that Advanced Management was unable to keep its proposed personnel committed to this contract while more than 4 months elapsed during which performance was suspended while RGI's initial protest was being decided.

Further, the record does not support RGI's contention that by allowing Advanced Management to provide substitutes for most of its proposed personnel, OPM would be permitting a cardinal change in the original contract. Where it is alleged that a change in contract terms is outside the scope of the original contract, the question is whether the original purpose or nature of the contract would be so substantially changed that the original contract and the modified contract would be essentially different and the field of competition materially changed. American Air Filter Co., Inc., 57 Comp. Gen. 285 (1978), 78-1 CPD ¶ 136, aff'd, 57 Comp. Gen. 567 (1978), 78-1 CPD ¶ 443. There has been no change in the purpose of Advanced Management's contract or in the qualifications of the personnel required by the contract; the only change here is in some of the contractor personnel pursuant to the contract's substitution clause.

Finally, RGI argues that OPM is accepting less qualified individuals than Advanced Management originally proposed to fill positions under the contract. Whether the personnel substitutions proposed by Advanced Management should be permitted depends entirely on the terms of the contract and the extent to which Advanced Management is complying with the contract is a matter of contract administration. Such concerns are for the contracting agency to resolve, not this

Office, 4 C.F.R. § 21.3(m)(1) (1991), as amended by 56 Fed. Reg. 3759 (1991); Bionetics Corp., B-221308, Dec. 24, 1985, 85-2 CPD ¶ 715.

The request for reconsideration and the protest are denied.


James F. Hinchman
General Counsel